BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ADRENA E. BERTRAND	)	
Claimant	)	
	)	
VS.	)	
	)	
WAL-MART	)	
Respondent	)	Docket No. 1,052,765
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 11, 2011 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery (ALJ).

ISSUES

The ALJ found that the claimant suffered a series of accidental injuries which culminated in an injury to her lower back on September 30, 2010, the date claimant provided written notice of her injury. He went on to find that claimant's injury arose out of and in the course of her employment and that timely notice was given. Respondent was ordered to provide temporary total disability (TTD) benefits as well as medical treatment with Dr. Smith.

The respondent requests review of a number of issues. Respondent maintains the evidence fails to support the ALJ's conclusion that claimant sustained personal injury by accident or that the alleged accident arose out of and in the course of claimant's employment. Respondent also contends that claimant failed to provide timely notice or written claim of her injury. Lastly, respondent asserts that claimant's alleged injury and need for medical treatment is the result of day to day living activities and therefore she is precluded from receiving benefits for this condition under the Kansas Workers Compensation Act (Act).

Respondent also argues that the medical evidence directly contradicts the claimant's testimony at the hearing and that when compared it is evident that claimant's testimony is self-serving only for the purposes of a body as a whole injury claim and a potential work disability recovery under *Bergstrom*. Respondent also argues that the ALJ erred in finding that claimant suffered a series of accidents and that the need for medical treatment is not the result of day to day living activities. Respondent requests that the ALJ be reversed and claimant denied benefits.

Claimant argues that the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant is a 56 year old woman who began her employment with respondent as a checker in 2007. Shortly thereafter, she was reassigned to be a stocker, a position that involved unloading boxes from a conveyor belt, stacking the boxes on pallets for delivery to the different departments within the store. This job required claimant to lift anywhere from 1-70 pounds repetitively, twisting, stooping and bending, all day long.[1]

In June 2008, after claimant had been performing the stocking job for approximately a year, claimant began noticing pain in her low back and buttocks while unloading groceries. In particular, claimant remembers lifting a box which contained large jars of pickles. Over time, the pain would increase, depending on the work being performed, and she began to notice that the pain would extend into her leg and down to her foot. Ultimately, her foot would go numb. According to claimant, she told her supervisor, Dixie Hood, and a manager, Brad, of her problems and attributed her back hurting to all the heavy lifting she was doing at work.[2] Claimant testified that respondent did not offer to send her for treatment of these complaints. Rather, she was told that this was just part of the job. She continued to work for respondent at her normal duties until September 20, 2010, when she was disciplined for attendance issues. After working a few days as a greeter, claimant was terminated from respondent's employ.

Claimant does not deny an earlier back injury while working for another employer back in 1989. But claimant maintains that she recovered from that injury and had no lasting problems. It appears from the medical records that claimant may not have told some of her treating physicians about this earlier injury, although claimant testified that she was not asked about previous injuries.

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[1] P.H. Trans. (Feb. 11, 2011) at 10.

[2] *Id.* at 14.

Although terminated in September, claimant sustained other work-related injuries to her upper extremities while working for this respondent and while receiving treatment from Dr. Donald T. Mead for those conditions in October 2010. Claimant voiced complaints about her low back, and Dr. Mead ordered x-rays and recommended treatment, although he did not connect these complaints with any specific injury while working for respondent.

Claimant initiated this claim, alleging a series of accidents to her low back commencing in June 2008 through her last date of work in September 2010. She offered the opinions of Dr. Edward Prostic in support of her contention that she sustained a series of repetitive injuries to her low back while in respondent's employ that now required treatment. The ALJ appointed Dr. Joseph W. Huston to provide an independent medical examination. Dr. Huston conducted his examination on January 7, 2011. Following receipt of Dr. Huston's report, another preliminary hearing was held.

At this hearing, the ALJ framed the issues as to be determined as follows:

> JUDGE AVERY: Okay, counsel, we had discussions off the record. The claimant is seeking medical treatment for her back with Dr. Smith. Claimant has alleged a series of accidents. **We have had discussions off the record and we arrived at a date of accident, if there was one, of 9-30-10.** The respondent denies the claimant met with personal injury by accident on the date or dates alleged. Respondent denies the alleged accidental injury or injuries arose out of and occurred in the course of employment. Respondent denies timely notice. Respondent admits the relationship of employer/employee and coverage by the Act **and timely written claim**. Any additions, modifications, or corrections to that record before we get started?
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> MR. PEARSON: None, Your Honor.
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> MR. BERGMANN: None, Your Honor, although I'd like to put on the record that we're going to include the [previous] preliminary hearing transcript hearing and the exhibits . . .[3] (emphasis added)

The hearing proceeded and after listening to claimant's recitation of the events leading up to her termination, her work duties and symptoms, the ALJ found her claim compensable. He reasoned that:

> Although Dr. Huston's report notes that claimant's symptoms "may result" from aggravation of a pre-existing spine problem, the Court is convinced claimant's testimony demonstrates she aggravated her back condition with the pickle lifting incident in the summer of 2008 and that she continued to injure her back with the performance of her work duties. She testified her pain was initially a "4" on a scale

[3] *Id.* at 3-4.

> of 1-10 and increased to a "8". The doctor stated the aggravation "has not been documented at this point." However, it should also be noted the doctor also stated, "The lower back complaints including right parasthesias have not been worked up or treated in any way.["][4]

Based upon these findings, he found claimant met her burden of proof to establish a compensable accident culminating in an injury on September 30, 2010.[5] He awarded TTD benefits and ordered respondent to provide medical treatment with Dr. Michael Smith, as per claimant's request. Respondent takes issue with every legal finding made by the ALJ and asserts that, not only was the ALJ wrong, he exceeded his jurisdiction in awarding claimant benefits.

A number of respondent's arguments are easily disposed of. Respondent contends claimant failed to give timely notice of her injury and argues -

> While the claimant testifies that she may have told someone at Wal-Mart about her alleged injury in August 2008, that testimony is not supported by documentation, unspecific as to whether she advised that her paid [sic] was related to work or to activities at home, and is not credible based upon the claimant's past history in this claim.[6]

This contention suggests that something in writing is necessary for purposes of *notice* of injury and ignores the entirety of claimant's testimony.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." Uncontradicted medical testimony unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.[7]

Here, claimant testified that she told her supervisor, Dixie, that her back was hurting from lifting the heavy boxes. This assertion is uncontroverted. And while respondent makes much of claimant's credibility, the ALJ found her to be believable. Based upon this

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[4] ALJ Order (Feb. 11, 2011) at 1-2.

[5] It appears from the ALJ's Order that September 30, 2010 is the date claimant provided written notice of her claim and under K.S.A. 44-508(d), the ALJ determined this was the appropriate date of accident.

[6] Respondent's Brief at 16 (filed Mar. 14, 2011).

[7] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

record, particularly the lack of any evidence to the contrary, this Board Member has no difficulty affirming the ALJ's conclusion with respect to timely notice of a claim. Moreover, the respondent's contention that a corroborating piece of writing is simply unsupported by the statutory language and no such requirement should be read into this statute.[8]

Respondent also strenuously argues that claimant failed to provide timely written claim based upon an accident date of June 1, 2008. The premise of this argument is that claimant did not sustain a series of injuries but rather, sustained a single accident in June 2008 when she lifted the box containing the jars of pickles.

As noted above, the ALJ framed the issues and summarized the stipulations made by the parties on the record and asked for any corrections. That recitation includes the statement that respondent had stipulated to timely written claim. Respondent had ample opportunity to correct that stipulation. It is disingenuous for respondent to now argue that claimant failed to provide timely written claim. The ALJ's conclusion with respect to timely written claim is affirmed.

Similarly, the ALJ indicated the parties had "arrived" at a date of accident of September 30, 2010. It is unclear how this date came to be selected, but this suggests that there was some sort of agreement, at least for preliminary hearing purposes. Even so, respondent's brief takes issue with the ALJ's conclusion with respect to claimant's date of accident. If there was a stipulation, respondent again asserts a disingenuous argument by now contesting that finding. If there was no such stipulation, respondent had its chance to correct the record and failed to do so. Independent of that reasoning, not every issue is ripe for appeal from a preliminary hearing.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing

[8] See e.g., *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[9]

Here, this Board Member finds that the ALJ's decision with respect to claimant's date of accident is not an issue that the Board can consider when presented on appeal from a preliminary hearing. Moreover, in spite of respondent's contention that the ALJ exceeded his jurisdiction, this Board Member does not find the ALJ's conclusion on this issue to be one that meets that standard. This is particularly true given the language that the parties "arrived" at the September 30, 2010 date of accident which strongly suggests that respondent had some input into that decision and agreed to it.

Similarly, respondent also contests the ALJ's conclusion that claimant sustained a series of accidents.[10] As noted above, the parties had some discussion with the ALJ concerning the date of accident and the parties "arrived" at a date of accident which is premised upon a series of microtraumas, as contemplated by K.S.A. 44-508(d). It is distressing that respondent now wants to distance itself from that understanding for purposes of this appeal. It remains clear from both the ALJ's recitation and the respondent's brief to the Board that respondent denies any actual injury occurred and further denies that claimant sustained any injury arising out of and in the course of her employment regardless of the date of accident. Nonetheless, at the preliminary hearing before the ALJ respondent seemed to concede that *if* there was an injury, it is based upon a series of accidents and culminated in an injury (by virtue of K.S.A. 44-508(d)) on September 30, 2010. Respondent's attempt to now deny this in an attempt to reverse the ALJ's Order is unacceptable. Moreover, this Board Member has no jurisdiction to address this particular contention under K.S.A. 44-534a and specifically finds the ALJ did not exceed his jurisdiction in concluding claimant sustained a series of accident culminating in an injury on September 30, 2010.

The balance of respondent's arguments are all intertwined with one another and stem from respondent's contention that her present complaints are attributable to either an earlier injury, or her day-to-day activities and are in no way causally related to her work activities. At the heart of these arguments is respondent's assertion that claimant failed to disclose her prior low back complaints to either Dr. Mead, Dr. Prostic or Dr. Huston as well as her own testimony that her back hurt not only at work, but while she was at home, performing normal housework.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[9] See K.S.A. 44-551.

[10] Respondent's Petition for Review indicates the following issue: "Whether the claimant suffered a single traumatic accident or a series of accidents? (K.S.A. 44-508(d))".

right depends.[11] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[12]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[13]

Admittedly, claimant is less than clear about the onset of her symptoms, is easily confused when asked about dates and while she concedes the existence of a prior injury, she maintains that the physicians did not ask her specifically about that prior injury, when they most likely did given the context of the reports. Yet, the ALJ concluded that claimant was a "credible witness" and that testimony, coupled with Dr. Huston's observation that her present complaints increased with the performance of her work duties and had yet to be fully explored, warranted a finding that claimant was entitled to medical treatment.

This Board Member finds the ALJ's conclusions to be persuasive, given the evidence contained within the record. Accordingly, the ALJ's conclusion that claimant sustained a personal injury by accident, arising out of and in the course of her employment for which she gave timely notice and written claim is affirmed. Likewise, this Board Member is not persuaded that claimant's present need for medical treatment is the result of claimant's day-to-day activities.[14] Simply put, the record reveals that claimant's work activities required her to repetitively unload boxes weighing as much as 70 pounds, all day long. Although claimant testified to performing some light housework duties on her own time, nothing she describes doing while in her own home approaches the weigh limits described during her normal working hours.

CONCLUSION

This Board Member finds the ALJ's conclusions as to personal injury by accident, arising out of and in the course of claimant's employment with respondent, and timely notice and written claim should be affirmed. Likewise, the ALJ's conclusions as to the claimant's date of accident, September 30, 2010, at this juncture of the claim remains intact and respondent's appeal of that issue is dismissed inasmuch as the Board has no

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[11] K.S.A. 44-501(a).

[12] K.S.A. 44-508(g).

[13] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[14] K.S. A. 44-508(e).

jurisdiction over that issue. Finally, this Board Member concludes the ALJ's conclusion that claimant's present need for treatment is causally related, at least based upon this record, to her work activities while in respondent's employ and not to her own day-to-day activities is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated February 11, 2011, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of April 2011.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[15] K.S.A. 44-534a.